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## McIntyre in Context: A Very Personal Perspective

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KEYNOTE ADDRESS

**MCINTYRE IN CONTEXT: A VERY PERSONAL PERSPECTIVE**

Arthur R. Miller\*

I believe an audience always should know, as the youngsters say, where a speaker is coming from. Thus, in the spirit of full disclosure I acknowledge that your speaker today is a real throwback and often is heard to chant that inevitable and universal mantra of seniors, “it all used to be much better.”

It is difficult for me to realize that I have been involved with the procedure in civil cases, particularly in the federal courts, for over half a century as commentator, teacher, and participant. I was extremely fortunate to have learned the basics from a stellar teacher and mentor at the Harvard Law School—Benjamin Kaplan. Some might say that all I know is the Federal Rules of Civil Procedure (and perhaps a great deal of trivia about the New York Yankees). My attitudes on the subject may be thought by some to be dated and perhaps a bit ossified, but I am not embarrassed to say that central to how I look at things is a belief in the purposes of the Federal Rules as embedded in their text by the people who wrote them about seventy-five years ago—as stated in Rule 1, “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>1</sup> I fear, however, that we have been straying from that mandate.

When the Federal Rules were promulgated—in 1938—they embodied a justice-seeking ethos. The people who wrote them believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation. As a result, the Rules established a relatively plainly worded, non-technical system. Because the rulemakers were deeply steeped in the history of the technicalities of the prior English and American procedural systems, the Rules established a simplified pleading regime for stating a grievance that abjured factual detail, verbosity, and technicality. The objective was, “Let’s just get it on.” “Let’s rumble.” Relatively little was demanded of the plaintiff at the outset of a case. Just tell us why and where it hurts and what you want, something metaphorically analogous to Oliver Twist’s simple request in Charles Dickens’s novel for “more gruel, please.”<sup>2</sup>

The Rules’ so-called notice pleading regime prized access and only required that the opposing side be informed of what the plaintiff claimed.<sup>3</sup> That was followed by the availability of wide-angle discovery into the facts of the dispute,

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1. FED. R. CIV. P. 1. *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1011–1030 (3d ed. 2002) (discussing FED. R. CIV. P. 1).

2. *See* CHARLES DICKENS, *OLIVER TWIST* 11 (Kathleen Tillotson ed., Oxford Univ. Press 1966) (1838) (“Please Sir, I want some more.”).

3. *See generally* FED. R. CIV. P. 8(a)(1)–(3). One of the architects of the Federal Rules referred to this as the “cornerstone” of the new system. *See* Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 *LAW & CONTEMP. PROBS.* 144, 154 (1948).

permitting the parties to secure access to any information relevant to the subject matter of the action.<sup>4</sup> The objective of discovery was simple: no bonus points for surprises—the parties should have equal access to all relevant data; the litigation’s resolution should be based on the revealed facts, not on who was better at playing tricks or hiding the ball. A summary judgment procedure was available to avoid trial when discovery showed there was no factual dispute worthy of trial, but that motion was granted infrequently.<sup>5</sup> The case was to be determined using the gold standard of Anglo-American dispute resolution: a trial. When appropriate, that meant trial by jury. The process promoted openness in litigation and honored the day-in-court principle. To me, all this was very American! Striving to get it right after playing the game on a level litigation field seemed a worthy objective—like apple pie, and baseball, and the flag. And promoting its objectives seemed to me, as it had to my mentor, a worthy calling for one’s life.

That was the conception in 1938, and for many years that vision of civil justice was pursued by the bench and bar and taught in law schools.<sup>6</sup> But, of course, the earth and our society have moved, and the character of American civil litigation has changed dramatically from what it was back then. In 1938, the typical lawsuit involved a single plaintiff and a single defendant contesting about a discrete number of relatively simple issues. Today, science, technology, communications, economics, legal complexity, and mass phenomena characterize many cases. Moreover, in the past few decades, we have experienced a tremendous growth in multiparty, multclaim disputes, sometimes involving millions of people, and, of course, an extraordinary sophistication and expansion of class and mass actions, a development that to this point largely has been unique to the United States. These actions feature disputes about a tremendous range of highly sophisticated and intricate matters as well as incredibly important public policy issues that gifted attorneys are called upon to litigate—dangerous pharmaceuticals, asbestos and other toxic substances, mass disasters, mind numbingly complex financial transactions, technology disputes, defective products, and improper governmental conduct. As part of this growth, the federal courts have recognized that litigation arising out of mass phenomena and globalization cannot be resolved the old fashioned way—one by one—and

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4. See generally FED. R. CIV. P. 26–37.

5. See FED. R. CIV. P. 56; *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (“[Rule 56(c)] authorizes summary judgment ‘only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . .’” (alteration in original) (quoting *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627 (1944))).

6. See WRIGHT & MILLER, *supra* note 1, § 1029. The Federal Rules were embraced by many states, in whole or part. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 n.1 (noting that thirty-five states have adopted the Federal Rules).

this has put enormous pressure on our courts and Congress to modify existing procedural norms.<sup>7</sup>

The societal and technological revolutions that followed World War II transformed the business of our national courts. Over the past sixty-five years, we have had the most extraordinary expansion of federal substantive law in this country's history. An examination of the workload of the federal courts in the 1930s when the Rules were birthed shows that only a comparatively limited number of substantive areas were involved—a touch of antitrust, a little copyright, a few patent cases, various interstate commerce matters, and, of course, a range of state-based diversity of citizenship actions. The federal securities laws were in their infancy, the civil rights revolution was yet to happen. Yesterday's federal question cases represent a very small element of what is now on the dockets of federal courts. Today's worlds of civil and human rights, employment discrimination, environmental, consumer protection, and product safety litigation basically did not exist when the Federal Rules were formulated. Indeed, most of them still didn't exist when I was in law school; there were no law school courses on those subjects in the 1950s. It was a world of library books, fountain pens, manual typewriters, and carbon paper.

Additionally, the practice of law has become a business as much as a profession. I mourn that change, being an old fogey. Law practice today is highly competitive and territorial. Lawyers on both sides of the “v.”—and often even on the same side of the “v.”—troll for clients and play turf games. The mega-law firms, some now global in character, are partnerships in name only. For many, the billable hour is supreme. Law firm marketing, replete with wining and dining, networking meetings at posh resorts, and the distribution of glossy brochures, is now common place. And sometimes the deal-making among plaintiffs' lawyers has the feel of the haggling seen in the great bazaar in Istanbul. On the defense side, the turf in a case is divided in a more genteel, less visible fashion.

On a much more positive note, because of the tremendous development of federal law designed to meet the desire for social justice that came to the fore in post-World War II America, we have something we really didn't have in 1938—

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7. Two striking legislative developments in this vein are the enactment of the Multiparty, Multiforum Jurisdiction Act, 28 U.S.C. § 1369(a), in 2002, and the Class Action Fairness Act, 28 U.S.C. § 1332(d), in 2005. Both statutes replaced the historic requirement of complete diversity of citizenship with one of minimal diversity to facilitate and expand federal jurisdiction over certain categories of complex cases. See §§ 1332(d)(2)(A)–(C), 1369(a). The American Law Institute also has been very active on the subject. First, it approved the Complex Litigation Study in 1994, on which I served as Reporter. Then, the Institute approved the Aggregate Litigation Project in 2009. See Roger H. Trangsrud, *Foreword: Aggregate Litigation Reconsidered*, 79 GEO. WASH. L. REV. 293, 293 (2011). See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (discussing the impact of aggregate settlements); Symposium, *Aggregate Litigation: Critical Perspectives*, 79 GEO. WASH. L. REV. 293 (2011) (discussing aggregate litigation from fifteen scholarly views).

the public interest and social action bars. These “do-gooders,” and I say that with enormous respect and gratitude that they exist, resort to the civil justice system for various ideological and social justice reasons to expand rights and remedies for the groups they represent.<sup>8</sup>

Much wonderful and creative legal work in the public interest has been done by lawyers pursuing the private enforcement of public policies—indeed we sometimes call them “private attorneys general.”<sup>9</sup> Of course, many of these actors operate out of mixed motivation.<sup>10</sup> They work on a contingent fee basis, assume enormous risks, but are entrepreneurial in outlook, although embedded in their entrepreneurial activity often lies a strong desire to further the underlying public policies regarding the rights they seek to vindicate. Asbestos was held accountable by the private bar.<sup>11</sup> Tobacco was cabined by the private bar.<sup>12</sup> Defective pharmaceuticals such as diet drugs and Vioxx and other products are removed from our midst, and illicit financial and market practices of companies such as Enron are halted by the private bar.<sup>13</sup> And so, some Americans don’t die or become incapacitated from defective products or toxic substances and important social and economic policies are enforced because of what these lawyers do by pushing the law to be more and more sensitive to the needs of people, particularly the disadvantaged.<sup>14</sup> Thus, today there are private civil actions reinforcing laws relating to antitrust, securities, consumer protection and unfair business practices, civil rights, employment discrimination, the disabled, and my personal favorite, age discrimination. The work product of this segment of the bar speaks for itself.

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8. See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1183–86 (2009).

9. See generally William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2133–34 (2004).

10. See Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL’Y 1, 3–12 (2008).

11. See Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 899–914 (1996) (discussing mass tort litigation, including asbestos litigation, by private attorneys); Steve Olafson, *21 Steelworkers Who Contracted Asbestos Disease Win \$115 Million*, HOUST. CHRON., Feb. 20, 1998, at A1, available at [http://www.chron.com/CDA/archives/archive.mpl/1998\\_3035442/21-steelworkers-who-contracted-asbestos-disease-wi.html](http://www.chron.com/CDA/archives/archive.mpl/1998_3035442/21-steelworkers-who-contracted-asbestos-disease-wi.html) (describing the verdict against the Carborundum Company).

12. See Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs’ Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 227 (2001) (citing Barry Meier, *Cigarette Makers and States Draft a \$206 Billion Deal*, N.Y. TIMES, Nov. 14, 1998, at A1; Margaret Cronin Fisk, *\$145B! Husband-Wife Team Takes on the Tobacco Goliath and Walks Away with a Monster Jury Award*, NAT’L L. J., Feb. 19, 2001, at C14).

13. See, e.g., Alex Berenson, *Jury Calls Merck Liable in Death of Man on Vioxx*, N.Y. TIMES, Aug. 20, 2005, at C1 (describing \$253 million verdict for death related to pain drug); see also Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS U. L.J. 451, 484–85 (2000) (discussing the ability of the private bar to control certain “deep-pocket industries”).

14. See Reingold, *supra* note 10, at 12–31.

But a backlash has set in against the private enforcement of these important public policies—a backlash that champions corporate and governmental interests against the claims of individual citizens or the vindication of legislative or judicial norms. The plaintiffs’ bar has been vilified as a bunch of fee-hawking ambulance chasers; Americans have been defamed as litigious fortune hunters. Bogus statistics are propagated and fears are spread by claims that Americans pay a litigation tax rendering our businesses unable to compete. Politicians make merry with their attacks on our justice system and call for “tort reform,” and urban legends about certain cases—and sometimes imagined cases—abound, typically in highly distorted form. The so-called McDonald’s coffee cup case, for example, has been grotesquely misdescribed and, aided by simplistic media accounts, has become a cosmic anecdote. Recently, HBO aired a documentary entitled *Hot Coffee* that puts the case in proper perspective.<sup>15</sup> In some respects, we are witnessing a class struggle between consumers and “Corporate America.”

This backlash has been given considerable traction by the current Supreme Court, which has shown a broad judicial orientation generally favoring large corporate and government defendants, which has had significant effects on access to the federal courts and remediation. To take two examples, first, Supreme Court decisions have eliminated liability for aiding and abetting in certain financial contexts, no matter how egregious the conduct and the number of people hurt, thereby heightening the litigation barrier for aggrieved citizens.<sup>16</sup> Second, despite the global nature of today’s electronic securities market, making where a transaction is executed irrelevant, the Supreme Court has sharply limited the right of various groups of foreign investors to sue for alleged fraud under our securities laws, even when the defendant company has taken advantage of the American capital marketplace and some or most of the alleged wrongdoing has occurred in this country.<sup>17</sup>

Substantive law decisions such as these have been accompanied by a contemporaneous transformation of the way our courts process cases. I have grown increasingly concerned about procedural changes effected by the Supreme Court that have resulted in the earlier and earlier disposition of litigation and impaired a citizen’s opportunity for a meaningful adjudication of his or her grievances. Remember the image I suggested earlier—the civil litigation gold standard—trial before a jury. Today, there are hardly any federal civil trials—let alone jury trials.<sup>18</sup> Most courtrooms in federal courthouses are empty much of

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15. *HOT COFFEE* (HBO Documentary Films 2011).

16. See *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (citing *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994)); *Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc.*, 552 U.S. 148, 158 (2008).

17. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010).

18. Juries now may have anywhere from six to twelve members. See Fed. R. Civ. P. 48(a).

the time. Indeed, a contemporary cliché is to refer to “the vanishing trial.”<sup>19</sup> Cases simply do not survive until then; they are settled or, increasingly, dismissed, often long before trial.

This acceleration of case disposition has come about because courts have erected a sequence of procedural stop signs over the past twenty-five years. It has been an episodic and almost invisible process—a perfect illustration of what my TV mentor Fred Friendly called changing policy by one degree-itis. The phenomenon began in 1986 when the Supreme Court decided a trilogy of cases invigorating the summary judgment motion, which is largely a defendant’s procedural weapon.<sup>20</sup> This has encouraged defendants to make the motion more frequently and increased the likelihood of it being successful, thereby avoiding the risks of trial. And federal judges, resonating to the three Supreme Court decisions and possibly concerned with the length of their dockets, began to employ summary judgment more frequently. Unfortunately, there is reason to believe that they occasionally have inappropriately resolved trialworthy disputed fact issues or characterized cases as “implausible,” disposing of them on motion rather than allowing them to go to trial.<sup>21</sup>

A 1993 Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>22</sup> continued the trend by emphasizing the concept of judicial “gatekeeping,”<sup>23</sup> which has become an article of faith. The Court directed judges to oversee the admission of economic, scientific, and technological evidence, particularly when it takes the form of expert testimony.<sup>24</sup> The resulting *Daubert* motion and accompanying hearing have been especially burdensome for plaintiffs, who often must provide expert testimony or reports about the relevant technology or pharmacology, or the environmental impact of the defendant’s conduct, or whether the plaintiff was a victim of discrimination by an economic entity. Gatekeeping requires screening every expert, which represents another

19. See Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge’s Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 101 (2010), available at <http://www.fclr.org/fclr/articles/html/2010/Where%20have%20you%20gone.pdf>; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 67 (2006).

20. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986).

21. I have written about the implications of the 1986 trilogy at length in Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1044–74 (2003). The literature on these cases is voluminous. See, e.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME. L. REV. 770 (1988) (discussing the role of summary judgment in federal courts).

22. 509 U.S. 579 (1993). Two other cases fill out the so-called *Daubert* trilogy. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146–47 (1997).

23. See *Daubert*, 509 U.S. at 597.

24. See *id.* at 589.

procedural obstacle to reaching trial, another motion, another hearing, another potential issue on appeal, all causing more delay and expense. This plays perfectly into the hands of the billing-by-the-hour regime of the large firms that usually represent corporate interests; it has precisely the opposite effect on under-resourced contingent fee and public interest lawyers who must bear these expenses without any assurance of reimbursement. And, when a *Daubert* challenge is successful and the defense has eliminated the plaintiff's expert, the plaintiff's case often is so weakened that it has been set up for dismissal or abandonment—providing another avenue for early disposition of cases.

Additionally, judicially established heightened class action certification requirements have become a major obstacle to a case's forward movement. In many situations these judicially imposed demands effectively mean that a plaintiff has to establish certain elements of his or her case long before trial and without testimony or a jury.<sup>25</sup> Most recently, for example, the Supreme Court's decision in the much publicized case of *Wal-Mart Stores, Inc. v. Dukes*,<sup>26</sup> involving claims of gender discrimination brought on behalf of 1.5 million women employees, has increased the burden of showing "significant proof" of a general policy of employment discrimination in order to secure class certification.<sup>27</sup> This burden of pretrial persuasion represents another way of effectively terminating a class action short of any adjudication of a case's underlying merits, let alone trial or jury trial.

The class certification motion, thus, has become yet another procedural stop sign undermining the utility of one of the most important procedural mechanisms for handling disputes arising from large scale, small claim phenomena. If the class cannot clear the certification hurdle, as has become more and more common, cases are not pursued because they are not economically viable if pursued on an individual basis, leaving broad-based harms unredressed and important policies underenforced.<sup>28</sup> Even when this tactic does not succeed, the elaborate class certification process, which now includes the possibility of interlocutory appeal,<sup>29</sup> imposes additional cost and delay. Increased expense and the heightened risk of non-certification inhibits the institution of cases, some of

25. The judicial scrutiny of class certification requests has been expanded dramatically. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311–12 (3d Cir. 2008); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007), *abrogated by* *Erica P. John Fund, Inc. v. Haliburton Co.*, 131 S. Ct. 2179 (2011); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

26. 131 S. Ct. 2541 (2011). See generally Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rodgers*, 125 HARV. L. REV. 78 (2011) (discussing the implications of *Dukes* and other cases involving class action law suits).

27. *Dukes*, 131 S. Ct. at 2547, 2553–54 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

28. The 1966 amendment to Rule 23 clearly envisioned the use of the class action to empower those without "effective strength" to advance their claims. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

29. See FED. R. CIV. P. 23(f).



which quite possibly would prove to be meritorious, which leaves public policies underenforced and citizens uncompensated.

Along with *Walmart*, the Court's almost contemporaneous decision in *AT&T Mobility LLC v. Concepcion*<sup>30</sup> replaces judges and juries with one-by-one arbitration in many contexts better dealt with on an aggregate basis. Consequently, powerful economic entities have imposed no class action arbitration clauses on people in take-it-or-leave-it contracts (a practice likely to be increased) for such things as credit cards, mobile phones, brokerage accounts, car rentals, and a myriad of other social amenities and necessities. This is simply the latest example of arbitration clauses that have been allowed to trump access to the civil justice system despite contractual unconscionability or inequality of bargaining position. There was a time when people's rights under the Fifth, Seventh, and Fourteenth Amendments were treated more seriously.

In another major procedural transformation, the Supreme Court, in *Bell Atlantic Corp. v. Twombly*<sup>31</sup> and *Ashcroft v. Iqbal*,<sup>32</sup> erected an even earlier impediment on the procedural road map—heightened pleading requirements. These cases turn their backs on over sixty years of a relatively simple pleading regime.<sup>33</sup> An old fogey like me thinks fondly about the actual language of the federal pleading rule, which requires only a “short and plain statement,”<sup>34</sup> and remembers that the rulemakers drafted it that way to permit relatively easy entrance into the federal courts without technicality or formality and to minimize skirmishing over the sufficiency of the statement of the claim.<sup>35</sup> In effect, the rule's text says, philosophically at least, “Feel aggrieved? Well, come on in, this is a friendly, justice seeking litigation system and we'll sort out the issues when we get the facts during discovery.”

The rule essentially was rewritten by the Supreme Court in *Twombly* from requiring mere “notice” of the claim to demanding a factual statement of a “plausible” claim, with little guidance as to what that means.<sup>36</sup> Plausible? What does plausible mean? The Court's opinion tells us it's something more than purely speculative or possible, but it can be less than probable.<sup>37</sup> Of course, that's not very helpful. The Court was more specific two years later in *Iqbal*,

30. 131 S. Ct. 1740 (2011). See generally Resnik, *supra* note 26, at 122–33 (discussing the *AT&T Mobility* decision and class arbitration).

31. 550 U.S. 544 (2007).

32. 129 S. Ct. 1937 (2009).

33. *Twombly* and *Iqbal* were preceded by an unbroken string of Supreme Court reaffirmations of the easy access principle of Rule 8(a)(1). See, e.g., *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Conley v. Gibson*, 355 U.S. 41 (1957).

34. FED. R. CIV. P. 8(a); see generally 5 WRIGHT & MILLER, *supra* note 1, §§ 1215–54 (discussing FED. R. CIV. P. 8).

35. See generally 5 WRIGHT & MILLER, *supra* note 1, § 1217.

36. See *Twombly*, 550 U.S. at 570. “Plausible” thus has become the mantra-like concept for motions under both Rule 56 and Rule 12(b)(6).

37. *Id.* at 555–56.

saying it means that the pleading must “show”—a word in the rule never previously focused on or thought to be a qualitative requirement—that there is a reasonable possibility of a right to relief.<sup>38</sup> And how are district judges supposed to divine that? The Court has invited them to use their “judicial experience and common sense.”<sup>39</sup> Hmmm, so—to be a bit sarcastic—that means a newly appointed judge has no judicial experience to employ, and we are supposed to believe that common sense is generously and equally distributed among federal judges. In addition, the district judge is to compare the actionable nature of the challenged conduct to a hypothesized innocent explanation of the defendant’s actions, which sounds very much like evaluating the merits of a case, rather than simply determining the legal sufficiency of the statement, on the basis of a single document—the complaint—without having the benefit of discovery, let alone anything remotely approximating a trial.<sup>40</sup>

Remember, a motion to dismiss classically has been viewed—for hundreds of years—as a procedure that only determines the legal sufficiency of the complaint.<sup>41</sup> It asks a simple question of law—does the complaint state a legally cognizable claim? For example, suppose I claim that one of my students gave me a dirty look in class. Whatever procedural system you test that pleading under, it is vulnerable to a motion to dismiss—as it was to a code motion to dismiss, or a common law demurrer<sup>42</sup>—if directing a dirty look at another is not actionable under the governing substantive tort law. Conversely, if there were such a tort, the case would proceed.

The pleading challenge had nothing to do with what actually happened to the plaintiff, let alone who should win on the merits. Absolutely nothing. As any good civil procedure instructor tells his or her class each year, on a motion to dismiss, the judge is supposed to bend over backwards, accept the allegations as pleaded, and interpret the complaint in the light most favorable to the pleader.<sup>43</sup> But now the motion to dismiss may well become a trial-type inquiry based on nothing but judicial intuition and subjectivity with the capability of terminating a

38. *Ashcroft v. Iqbal*, 129 S. Ct. 1373, 1377 (2009) (quoting FED. R. CIV. P. 8(a)(2)).

39. *Id.* (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev’d*, *Iqbal*, 129 S. Ct. 1373).

40. It has been suggested with some persuasiveness that the cases have merged the motion to dismiss and the motion for summary judgment. *See, e.g.*, Richard A. Epstein, *Bell Atlantic v. Twombly, How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007) (discussing *Twombly* and arguing in favor of “mini-summary judgments”); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (discussing the convergence of the motion to dismiss and the motion for summary judgment). My concern is that in some cases the plausibility determination will transgress the limited judicial inquiry permitted by Rule 56 on a summary judgment motion.

41. *See generally* 5B WRIGHT & MILLER, *supra* note 1, §§ 1355–57 (discussing FED. R. CIV. P. 12(b)(6)).

42. *See* CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* § 78, at 501 (2d ed. 1947); BENJAMIN J. SHIPMAN, *HANDBOOK OF COMMON-LAW PLEADING* §§ 146–47 (Henry Winthrop Ballantine ed., 3d ed. 1923).

43. *See* 5B WRIGHT & MILLER, *supra* note 1, § 1353, at 417 (citations omitted).

case at its outset. So, as they say in the land of my youth, Brooklyn, in one “fell swoop” those two recent Supreme Court decisions destabilized both the established pleading standard and the motion to dismiss practice under the Federal Rules.<sup>44</sup>

Moreover, the Supreme Court has ignored the problem of information asymmetry.<sup>45</sup> In many modern litigation contexts, the critical information, such as the formulation and testing of a pharmaceutical, is entirely in the defendant’s possession and is unavailable to the plaintiff. I can understand requiring a plaintiff to plead what he or she knows or should and could know with reasonable effort, but it is rather futile and a bit absurd to tell someone to plead what he or she doesn’t know. Discovery was designed to provide each side with access to relevant information that was beyond its reach so that the litigation playing field would be level and more informed settlements and trials would be possible.

Employment discrimination cases provide a useful example. The plaintiff has been fired. One of the first rules of discharge is don’t tell the employee why. If facts must be pleaded to state a claim for discriminatory discharge or failure to promote, or some other possibly nefarious practice, how can the plaintiff surmount the newly minted pleading requirement? How does the plaintiff show discriminatory conduct—let alone a pattern or practice of discrimination—without access to the employer’s conduct regarding not only the plaintiff, but its history regarding other employees? Unfortunately, employment discrimination cases are not being instituted—let alone surviving—in many parts of the country.<sup>46</sup> In a different context, analogous to that in *Iqbal*, how does a pleader challenge illegal or unconstitutional governmental action—whether by a municipal, state, or federal employee—without deposing and seeking documents from members of the department or agency in which that challenged conduct took place?

To me, it makes no sense to apply the new pleading standard to slip-and-fall cases, fender benders, and a wide swath of lawsuits that do not require extensive gatekeeping, with its attendant cost, delay, and risk of premature termination. And yet, the new pleading principles were said by the Court in *Iqbal* to apply to all federal civil actions.<sup>47</sup> So, where are we? Pleading facts now seems to be

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44. My less than complimentary views of *Twombly* and *Iqbal* are spelled out at length in Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

45. See *id.* at 43, 45–46.

46. See Laura Beth Nielsen, Robert L. Nelson & Ryan Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. OF EMPIRICAL LEGAL STUD. 175, 195 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice*, 158 U. PA. L. REV. 517, 519 (2010).

47. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (quoting FED. R. CIV. P. 1). In one relatively recent case that I just love (in truth I hate it), the plaintiff slipped in a grocery store and was seriously injured; the court dismissed the action. Why? Because the plaintiff failed to plead what the substance on the floor was, how it got there, how long it had been there, and whether

what is required of plaintiffs, which represents a throwback to the discarded code procedure era.<sup>48</sup> The Supreme Court has moved the system from a requirement of giving notice, which is what the pleading rule was designed to accomplish, to a more detailed fact pleading structure, which is exactly what the Federal Rules were drafted to reject.

And, most recently, late last Term the Court pushed the envelope in *J. McIntyre Machinery, Ltd. v. Nicastrò*,<sup>49</sup> one of the two cases that bring us together for this conference. The Justices divided 4-to-2-to-3 (a very odd double play combination for you baseball fans) regarding the constitutional limits on the permissible personal jurisdiction reach of courts over defendants who are not present in the forum.<sup>50</sup> Departing analytically and linguistically from its personal jurisdiction jurisprudence going back sixty-five years to the seminal decision in *International Shoe Corp. v. Washington*,<sup>51</sup> four Justices clearly signaled a contraction of that reach. According to the *McIntyre* plurality, the Constitution “permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”<sup>52</sup> It now appears that a corporate defendant may be able to structure its distribution system and send products to all fifty states, while avoiding the reach of any, or almost any, individual state’s courts. No longer would injured consumers and employees be free to bring cases where they receive defective products or services, or live, or were injured; rather, plaintiffs might have to litigate in distant fora, and possibly in other countries, or abandon their claims altogether.

Despite the expressed concern of Justice Kennedy for the small Florida farmer whose produce may be marketed nationally, and of Justice Breyer for the Appalachian potter being sued in Alaska or Hawaii,<sup>53</sup> the obvious beneficiaries of *McIntyre*’s constriction on personal jurisdiction will be manufacturers, pharmaceutical companies, and other significant economic entities. In my view, the four plurality Justices should not have focused on formal contacts and notions of sovereignty and the defendant’s intent to submit to the forum, with no acknowledgement that the farmer and potter can be protected by the principles of

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anyone else had slipped and fallen. *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at \*2 (W.D. Va. Aug. 24, 2009). How was the plaintiff supposed to know these things without access to discovery?

48. Some commentators warned that this was upon us even before *Twombly* and *Iqbal*. See, e.g., Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1007–08 (2003) (citations omitted) (detailing how code pleading survives in federal courts as “hyperpleading”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435 (1986) (“[F]act pleading, the bête noir of the codes, seems to be enjoying a revival in a number of areas.”).

49. 131 S. Ct. 2780 (2011).

50. See *id.* at 2785 (plurality opinion).

51. 326 U.S. 310 (1945).

52. *J. McIntyre*, 131 S. Ct. at 2788 (plurality opinion).

53. See *id.* at 2790; *id.* at 2793 (Breyer, J., concurring).

fair play and substantial justice recognized in *International Shoe* and reprised in *Asahi Metal Industry Co. v. Superior Court*.<sup>54</sup> That is why I view *McIntyre* as yet another procedural stop sign, this one posted at the very genesis of the case. The *McIntyre* plurality opinion is an open invitation to defense interests to exploit this stop sign for all it is worth. Next, we will be barring the courthouse door to all but a chosen few.

When one takes a panoramic view of these phenomena, and the emergence of other issues that courts now demand be focused on early in the proceedings, such as standing and preemption, there is no secret about what is happening or frankly, why and who benefits. Previously, we had a commitment to trial, and when appropriate, jury trial. Then, the summary judgment motion began to replace that possibility of trial. Now, we have a potentially dispositive pleading motion coming even earlier than the summary judgment motion, which, when granted, prevents any trial. Along the way, *Daubert* gatekeeping and class action restrictions have presented other stop signs. And most recently, *McIntyre* offers a heightened prospect of a dismissal for lack of jurisdiction. These cases have created procedural playthings for defendants that, not surprisingly, are now being employed with increased frequency<sup>55</sup> and producing an increased number of dismissals.<sup>56</sup> More motions, more delays, more costs, more appeals, and potentially more early dismissals. It leads me to suggest that the system is suffering from a serious untreated case of premature termination.

We are moving toward a system in which an increasing number of civil actions may be stillborn. Case disposition is moving back in time and is based on less and less information regarding the merits of a dispute. A trial provides live evidence, examination, cross-examination, and often the deliberation of a jury. Summary judgment is based on lawyers' papers, although it often is delayed until after discovery, thereby at least giving both sides equal access to

54. 480 U.S. 102, 113 (1987) (quoting *Int'l Shoe*, 326 U.S. at 316) ("The strictures of the Due Process Clause forbid [the] exercise [of] personal jurisdiction under circumstances that would offend 'traditional notions of fair play and substantial justice.'"). *McIntyre* did nothing to resolve the confusion created by the three divergent opinions in *Asahi*. See *Asahi*, 480 U.S. at 105. Thus, serious ambiguities about critical jurisdictional aspects of modern commerce and manufacturing continue to exist. Even more difficult questions are posed by the various activities that take place on the Internet.

55. See JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 8 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf). The notion that the cases have not substantially impacted dismissal practices and outcome is forcefully contested in Lonny Hoffman, Twombly and *Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss, 6 FED. COURTS L. REV. 2 (2011), available at <http://www.fclr.org/fclr/articles/html/2010/Hoffman.pdf>. The author points to the increased costs imposed by the significant increase in the incidence of motions to dismiss and the increased likelihood after *Iqbal* that the motion will be granted. *Id.* at 10, 16; see also SCOTT DODSON, SLAMMING THE FEDERAL COURTHOUSE DOORS: NEW PLEADING IN THE TWENTY-FIRST CENTURY (Oxford Univ. Press, forthcoming 2013).

56. See Hoffman, *supra* note 55, at 10.

the facts. The motion to dismiss, however, is based only on the complaint. No discovery. No evidence. No witness testimony. No cross-examination. No voice of the community. Adjudication based on paper should be the exception, not the rule. Deciding cases based on a single paper—the complaint—as evaluated by subjective factors such as judicial experience and common sense and an abstract comparison to a hypothesized innocent explanation is a process that is alien to me. And, personal jurisdiction challenges, of course, have nothing to do with the central justice question—who should win and who should lose.

But it must be acknowledged that there are concerns of uncertain dimension and significance that provide some justification for what has happened. Judges have very real docket pressures and discovery, especially e-discovery, can be extremely resource consumptive in large-scale cases. Even a fossil like me recognizes the need for some change; however, the extent of the changes that have occurred and how they came about has produced a one-sided effect on access and the day-in-court principle. Our most important litigation values have been impaired by the erection of procedural stop signs, and produced a collateral cost far too high to be justified by demands for efficiency, especially when the supposed rationale for these changes lacks any real empirical support.

A majority of the Justices have offered three propositions to justify the changes in the procedural regime: there is a threat of abuse, litigation is expensive, and the possibility of extorted settlements must be avoided.<sup>57</sup> Assertions of abuse are not new. When I was the Reporter to the Federal Rules Advisory Committee in the late 1970s and during the first half of the 1980s, the focus was on containing the pretrial process, because that is where systemic cost and delay resided. Even then, the defense bar and its clients were complaining about abuse and frivolous litigation and the need for cost reduction—the drumbeat for reform was constant and noisy. Urban legends and cosmic anecdotes were being propagated.<sup>58</sup> All of this being new to me at the time, I spent six months going to bar association meetings and judicial conferences asking people to tell me about abuse and frivolous litigation so that I could aid the Committee in pursuing intelligent rule revision. I was like Diogenes holding my lamp high, searching for “truth.” I listened and listened and listened. After six months, I reported to the Committee that I had learned a great deal about abuse and frivolous litigation. I could tell them with considerable confidence that, according to the practicing bar, frivolous litigation is any case brought against your client, and abuse is anything the opposing lawyer is doing.

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57. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559–60 (2007); see also *Swanson v. Citibank, N.A.*, 614 F.3d 400, 412 (7th Cir. 2010) (Posner, J., dissenting) (arguing that the Supreme Court's new approach “creates greater symmetry between the plaintiff's and the defendant's litigation costs, and by doing so reduces the scope for extortionate discovery”).

58. As the great baseball philosopher Yogi Berra might say, what we are hearing today is “déjà vu all over again.” YOGI BERRA, *THE YOGI BOOK* 30 (1998).

More than thirty years have now passed and except at the margins, I cannot do any better in identifying litigation abuse and frivolousness or in distinguishing it from legitimate advocacy. We have never defined it; we have never measured its frequency; we don't know who is guilty of it. In my judgment, it simply lies in the eyes of the beholder. Despite its amorphousness, however, these abstractions motivate judicial decisionmaking, apparently including that of Supreme Court Justices.

And what of extortionate settlements? How many times does that occur? Again, we simply don't know. I don't think we even know what an extortionate settlement is or how to recognize one.<sup>59</sup> Some settling defendants find it useful to proclaim, "Oh, we were extorted." How do we know that is true? We don't. People and entities settle cases for a myriad of varied human and business reasons that they believe will further their self-interest, and those reasons may have little or nothing to do with the validity of the asserted claims or defenses.

And what about complaints regarding costs? Of course no one likes them. But again, we really don't know that much about the economic aspects of litigation. The limited empirical evidence we have, which often is simply impressionistic or simplistic, is largely focused only on defense costs—never the plaintiff's, the judicial system's, or society's—and suggests that in most cases costs are less than what they often are claimed to be, and that the very high cost cases represent only a rather small slice of the federal workload.<sup>60</sup> Even as to "big" cases, we don't know how much of the cost and delay are the result of tactical decisions by the defense that are driven by its economic self-interest regarding billing, and reflect practices of attrition and dilatoriness, as opposed to the hyperactivity and fishing expeditions of the plaintiffs' bar. Yet all of the procedural stop signs with which plaintiffs must contend apply to every case.

Now that the judiciary has shifted the procedural system dramatically against plaintiffs by moving the specter of case termination forward in time, denying access to discovery, limiting forum choice, and requiring potential plaintiffs to engage in pre-institution investigation, including finding snitches among a defendant's employees (which is what plaintiffs' lawyers often must do in the hope of pleading enough to survive a motion to dismiss), could it be that it is the defense bar that has been empowered by various procedural changes to extort settlements that are artificially low? Maybe that is the real extortion phenomenon—not contingent fee plaintiffs extorting settlements from defendants. Or, maybe it's a bit of both? Or, maybe extortion really is a

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59. Nonetheless, courts repeat the rhetoric. See, e.g., *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 667, 668 (9th Cir. 2009) (emphasizing the Supreme Court's settlement language in *Twombly* and stating that the complaint in the case at issue was "the type of 'in terrorem' increment of the settlement value' that the Supreme Court mentioned in *Twombly*" (quoting *Twombly*, 550 U.S. at 558)).

60. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY 1, 2 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); Miller, *supra* note 44, at 61–71.

nonissue? We don't know. We do . . . not . . . know. Dramatic procedural shifts have occurred based on unsubstantiated assertions and assumptions.

A majority of the Justices seem quite concerned about the litigation burdens on corporations and governmental officials and have expressed little concern for other values.<sup>61</sup> Shouldn't we care about the litigation burdens on plaintiffs? Shouldn't we care that potentially meritorious cases involving important public policy and private interest matters are being deterred from being instituted?<sup>62</sup> Shouldn't we care about cases being dismissed because of procedural stop signs despite obvious information asymmetry or potential merit? Shouldn't we care that possible antitrust and civil rights and consumer violations and product failures are not being deterred or compensated for, or that people are being improperly detained by government action?

What is happening to this nation's longstanding legislative and judicial commitment to the private enforcement of its most fundamental public policies and constitutional principles? If the procedural rules are not conducive to litigation designed to vindicate those policies, or if cases pursuing that end cannot be lodged in a convenient place or survive a motion to dismiss, they won't be initiated and those policies will not be furthered. In my judgment, that is not what our system is designed to achieve. As I have said, I believe in the goals of the system as stated in Rule 1: "the just, speedy, and inexpensive" determination of civil actions. Yet, the Supreme Court has given primacy to efficiency and systemic cost reduction, perhaps at the expense of a true search for truth. Yes, we would like some speed in resolving litigation. Yes, we would like the process to be inexpensive. But remember the third word in Rule 1—"just." Although the word is shorter than the other two, seeking a "just" result is at least as important as the other objectives. I fear that after more than seventy years, the Rules have lost their moorings, and some in the profession, both on the bench and in the practicing bar, have lost sight of the objectives our procedural system should pursue. Each year I ask my first year procedure students, "Why do we have courts?" The replies are predictably platitudinous. And yet, after asking the question for more than fifty years and watching the procedural changes of the last quarter century, I no longer am clear as to what the answer is today.

The developments I have described represent a downgrading of the day-in-court principle and the commitment to jury trial in favor of accelerated decision-making by judges. It should be obvious that procedural stop signs primarily further the interests of defendants, particularly those defendants who are repeat players in the civil justice arena—large businesses and governmental entities. Not surprisingly, people ask me: "Is this a business oriented Supreme Court?" or

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61. See *Twombly*, 550 U.S. at 559; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

62. None of the available empirical evidence purports to measure these effects of inappropriate procedural dismissals. Indeed, it is doubtful that they can be effectively measured. See Hoffman, *supra* note 55, at 30.



occasionally, someone will assert, with a certain bite in his or her voice: “The Chamber of Commerce seems to have a seat on the Supreme Court.” Is there any truth to this? I often equivocate in my answer. But I do suppose it is fair to say that some of the Justices have a clearly defined predilection that favors business and governmental interests. Similarly, I do not think it unfair to say that several of the members of the current Court and significant parts of the federal judiciary are anti-litigation, which, of course, negatively impacts citizen access, which works against those in our lower and middle classes. That is an unfortunate echo of today’s societal inequities and the stunning disparity in power, income, and status in our nation.

What appears to be happening simply isn’t the procedural process that some of us dinosaurs grew up with, and frankly, I don’t think a system that focuses on gatekeeping, early termination, and erecting procedural stop signs befits the aspirations of the American civil justice system. To me, this is a rather myopic field of vision. At a time when the complexities of American life and the need for a level litigation field seem to be increasing constantly, our courts should focus on how to make the civil justice system available to promote our public policies—by deterring those who would violate them and by providing efficient procedures to compensate those who have been damaged.<sup>63</sup> Our judges should concentrate on effectuating the vision of the rulemakers of the 1930s and extending the principle of citizen access and the resolution of cases on the merits.

A Supreme Court that appears preoccupied with ways of avoiding adjudication on the merits seems no further advanced in answering the question of why we have courts than my students and I have been all these years. If necessity is the mother of invention, perhaps it is time to declare that our civil justice system is in a state of necessity, and the time has come to reestablish some of the procedural features many of us were proud to practice. There are a myriad of possibilities for achieving the objectives of Rule 1 other than putting up stop signs. Let’s explore them. Our aspirations should be those that took us to the moon and beyond. They should not be to construct a procedural Maginot Line to impair meaningful citizen access to our courts.

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63. See Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997).